K.E.P. MOHAMED ALI v. K.E.P. MOHAMED ISMAIL

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman & Abdul Hamid F.JJ.) November 18 & December 12, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 33 of 1980]

Practice and Procedure — Action to recover money under deed of compromise — Plea of limitation — Fresh agreement entered into — Acknowledgment of debt — Not pleaded in statement of claim or reply — Defendant not taken by surprise — Limitation Ordinance, 1953, ss. 6 & 26.

Limitation — Action to recover money under deed of compromise — Limitation Ordinance, 1953, ss. 6 & 26.

The respondent had acknowledged that a sum of $100,000 was due to him under a Deed of Compromise dated April 24, 1967, made between him and the appellant. When the terms of the deed of compromise were not complied with the appellant instituted proceedings on April 11, 1974 to recover the sum. The defence was limitation and the learned Judicial Commissioner held that the action was time-barred. At the trial the appellant adduced evidence that he and the respondent had entered into an agreement on March 23, 1976 in India and under that agreement the appellant had undertaken that upon payment of $90,000 to him within a period of nine months he would withdraw his suit for $100,000. The acknowledgment was not pleaded in the statement of claim or in the reply.

Held, allowing the appeal, although the claim was statute-barred on April 11, 1974 there had been an acknowledgment of the debt in 1976 and although the acknowledgement was not pleaded in the statement of claim or the reply, the case had been satisfactorily presented and developed in the proceedings before the High Court and there were materials on the record from which a decision to that effect could be arrived at.

Cases referred to:-

(1) *Spencer* v. *Hemmerde* [1922] 2 A.C. 507.
(2) *Wee Tiang Teng* v. *Ong Chong Hooi* [1978] 2 M.L.J. 54.
(3) *Consolidated Agencies Ltd.* v. *Bertram Ltd.* [1965] A.C. 470.
(4) *Dungate* v. *Dungate* [1965] 1 W.L.R. 1477, 1479.
(5) *Busch* v. *Stevens* [1962] 1 All E.R. 412.

FEDERAL COURT.

Dato Morris Edgar for the appellant.

Abdul Murad bin Sheikh Ismail for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): This is an appeal from a judgment of the Judicial Commissioner in an action, in which the plaintiff (the appellant) sought to recover from his brother, the defendant, (the respondent) $100,000 being the amount acknowledged to be due from him to the former under a Deed of Compromise dated April 24, 1967 made between them. The only defence put forward was that the debt was statute-barred. Since the right of the plaintiff was a claim for a liquidated pecuniary sum founded on contract, section 6 of the Limitation Ordinance, 1953 applies.

Section 6(1)(a) of the Ordinance is as follows:

"... the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say — actions founded on a contract...."

The facts of the case are clear and undisputed. On April 24, 1967 the parties entered into a Deed of Compromise whereby the defendant became the trustee of the plaintiff of an undivided one-third share in the lands and buildings known as Nos. 82A and B, Jalan Ampang, Kuala Lumpur. It was agreed that the defendant would transfer the said property free from encumbrances to the plaintiff. However, the said property was pledged by the defendant with 2 persons in Kuala Lumpur as security for a loan of $40,000 which said loan would fall due for payment on June 30, 1967. Under clause 3 of the agreement the defendant agreed and undertook to redeem the said property on or before that date and within 30 days thereafter the defendant was to transfer the said property to the plaintiff and upon such transfer the plaintiff should release and discharge the defendant from all claims by reason of the relationship of the defendant as trustee. Clause 5 further provides that if the defendant shall fail to transfer the said property within the time stipulated in Clause 3, the plaintiff shall be at liberty to recover from the defendant the sum of $100,000. From the events that have happened the defendant failed to transfer the said property within the time stipulated under Clause 3 of the Deed of Compromise. Accordingly the plaintiff instituted and took this action to recover the said sum of $100,000 on April 11, 1974. The learned Judicial Commissioner held that the action was time-barred. We agree with his finding.

In the course of the trial the plaintiff adduced evidence that both he and the defendant had entered into another agreement on March 23, 1976 in India in the presence of 5 arbitrators. Amongst other things in the said agreement was an undertaking by the plaintiff that upon payment of $90,000 to be made by the defendant to the plaintiff within a period of 9 months from the date of the said agreement the plaintiff shall withdraw his suit for the recovery of $100,000 brought against the defendant. It was contended on behalf of the plaintiff that the new agreement amounted to an acknowledgement that the debt of $100,000 was still due and owing by the defendant to the plaintiff. Section 26(2) of the Limitation Ordinance was relied on and it reads:

"Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment."

It was therefore contended that time began to run from the date of the new agreement and the plaintiff's claim revived from that date and was not time-barred. The learned Judicial Commissioner rejected that argument. He held that the new agreement which was made after the pleadings had closed was an attempt to revive the cause of action which was statute-barred. He further held that the plaintiff in his reply pleaded that the law of limitation had no application to the case. He therefore dismissed the plaintiff's action.

This is a case where the plaintiff is seeking by action to recover a liquidated pecuniary claim and relies on the acknowledgement of the claim. There are three points for consideration: First, whether the new agreement dated March 23, 1976 amounts to an

unequivocal acknowledgement of the indebtedness or as being in any way inconsistent with the promise to pay which the law imputes to a debtor who unconditionally acknowledges his debt: *Spencer* v. *Hemmerde.*[1] Secondly, if so, does the acknowledgement constitute in itself a cause of action which is different from that which gives rise to the claim. Thirdly, should such a plaintiff plead the acknowledgement in his pleadings.

On the first point we need only refer to the decision of this court in *Wee Tiang Teng* v. *Ong Chong Hooi & Anor.*[2] where the Privy Council case of *Consolidated Agencies Ltd.* v. *Bertram Ltd.*[3] was followed. In that case it was held that for an acknowledgement sufficient to take it outside the Limitation Ordinance "the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is subsisting at the time of the acknowledgement." We now refer to the new agreement. Whether as a matter of interpretation it acknowledged a subsisting debt is a question which can only be answered with regard to the surrounding circumstances. That agreement refers to the liquidated pecuniary claim which the defendant acknowledged to be due from him to the plaintiff under a Deed of Compromise dated April 24, 1967 made between them. This of course implies that at the date of the new agreement there was between the parties a subsisting legal relationship of such a kind that the defendant was in a position to say at once how much was owing on that date. This is consistent with the existence of the contractual relationship under which a debt was presently owing. The second paragraph of the new agreement stated *inter alia* that the $90,000 should be given by the defendant to the plaintiff within 9 months and on that being received by the plaintiff the action brought by him to recover the $100,000 should be withdrawn. Read against this background, the new agreement seems plainly to have meant that the liquidated pecuniary claim was still owing. It appears to us that this is a way of saying: "if you pay me $90,000, the $100,000 which I am claiming from you and which you have acknowledged due to me would be withdrawn." We are satisfied that the new agreement in no way disputes the plaintiff's claim subsisting "at the time of the acknowledgement" or is inconsistent with what has been called "the promise artificially implied as a result of the admission of the debt"; it amounts to no more than a request to the plaintiff to settle the subsisting debt of $100,000 upon the payment of a smaller sum of $90,000. In the circumstances, and having regard to the manner in which the new agreement was made it amounted to no more than a request that the plaintiff would not pursue his claim in full. We are of the opinion that the new agreement was a sufficient acknowledgement to take it outside the Limitation Ordinance; it is of the same character as the letter so held to be an acknowledgement in *Dungate* v. *Dungate*[4] where the words used were:

"Keep a check on totals and amounts I owe you and we will have account now and then.... Sorry I cannot do you a cheque yet. Terribly short at the moment...."

Counsel for the defendant submitted that any acknowledgement of the liquidated pecuniary claim creates a new cause of action which is different from the cause of action which had accrued from the contract on which the claim was based. We reject that argument. An acknowledgement of a statute-barred debt does not raise a new claim or a new cause of action but constitutes the accrual of the right of action to recover the debt: see *Busch* v. *Stevens.*[5] We also refer to the speech of Lord Sumner in *Spencer* v. *Hemmerde, supra,* at page 524:

"I find that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise, which is inferred from the acknowledgement and 'continues' or 'renews' or 'establishes' the original promise laid in the declaration, is one which corresponds with and is not a variance from or in contradiction of that promise.... If so, there is no question of any fresh cause of action."

The facts relating to an acknowledgement are material facts upon which the plaintiff intends to rely when he starts an action for recovery of a debt or other liquidated pecuniary claim which, but for the acknowledgement, would be statute-barred. The question is: Should the facts relating to the acknowledgement be pleaded? There are observations in *Busch* v. *Stevens, supra,* which support the view that the proper place for facts which take the case out of the Limitation Act is in the statement of claim, and not in a reply. The authors of *Bullen & Leake* (12th Edition) at page 638 seem to suggest that the practice still prevails under which the plaintiff awaits the defence to see whether the defendant raises the plea that his action is statute-barred and then serves a reply alleging the facts and circumstances which afford the ground under the relevant statutory provisions for taking the case out of the Limitation Act. A statement in paragraph 653 of 28 *Halsbury's* Laws of England (4th Edition) sets out the desirable practice:

"Where there is an acknowledgement in writing or part payment, the cause of action accrues afresh. Where title would be extinguished but for such an acknowledgement or part payment, it seems that the acknowledgement or payment should be alleged in the statement of claim as part of the cause of action. That course would also seem desirable where only the remedy is barred; but in such a case an alternative course, which would not, it is thought, be wrong, would be to plead the acknowledgement or part payment in the reply."

In the present case, the material facts relating to the acknowledgement was not pleaded in the statement of claim; it was also not pleaded in the reply apart from stating that the law of limitation does not apply to the present action. That in our opinion is bad pleading. But it is a matter of indifference to the court whether the plea of acknowledgement is pleaded in the statement of claim or in the reply. If it is raised in the statement of claim, it would make a reply unnecessary and so reduce costs. A further advantage of pleading an acknowledgement in the statement of claim is that the defendant may thereby be led to refrain from raising the issue of limitation in the defence, thus narrowing the area of discovery and reducing costs: see *Bullen & Leake* (12th edition) at page 638. Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply. Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before

the High Court and we think there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

For this reason we allowed the appeal with costs here and below.

Appeal allowed.

Solicitors: *Dato Morris Edgar & Clough Thuraisingam; Kam Woon Wah & Co.*

HAJJAH HALIMAH BINTE HUSSAIN & ANOR. v. COLLECTOR OF LAND REVENUE, KUANTAN

[F.C. (Suffian L.P., Chang Min Tat & Syed Othman F.JJ.) December 8, 1980 & January 15, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 10 of 1980]

Land Law — Land acquisition — Value of land — Market value — Comparable sales — Appeal from trial court — Principles applicable.

In this case the Government had acquired certain lands including land belonging to the appellants. The Collector awarded $45,000 per acre. The appellants asked that the matter be referred to the High Court and in the High Court they asked for $4 per square foot or $174,240 per acre. The learned judge and one of the assessors valued the land at $50,000 per acre (the other assessor valued it at $60,000 per acre). The appellants appealed.

Held, dismissing the appeal: the learned judge had applied the right principles and had not acted on wrong principles; he had not misapprehended the facts which he detailed and weighed at length; nor had he made a wholly erroneous estimate of the value of the land.

Cases referred to:-

(1) *Nanyang Manufacturing Co.* v. *C.L.R. Johore* [1954] M.L.J. 69.

(2) *Collector of Stamp Duties* v. *Ng Fah In & Ors.* [1981] 1 M.L.J. 288.

The following authorities were also cited in argument: *Bertam Consolidated Rubber Co. Ltd.* v. *Deputy Collector of Land Revenue, Butterworth* [1965] 1 M.L.J. 171, 176; *Superintendent of Lands and Surveys, Sarawak* v. *Aik Hoe & Co. Ltd.* [1966] 1 M.L.J. 243.

HIGH COURT.

Teh Chin Yong and *A. Ramanathan* for the objectors.

Lamin bin Haji Mohamed Yunus, Legal Adviser, for the Collector of Land Revenue.

Abdul Razak J.: This is a reference to court under section 36(1) of the Land Acquisition Act on the owner's objection that the compensation awarded by the Collector was inadequate. The lands, the subject-matter of the acquisition, were acquired by the government for the proposed new hospital at Kuantan. The lots affected were 2182, 2183, 2184, 351, 2381, 2495 and 3409. For the purpose of the reference, only four were involved, Lots 2182, 2183, 2184 and 351. These were the subject of four separate references, Land References 6/77, 3/77, 4/77 and 5/77, in respect of Lots 2182, 2183, 2184 and 351 respectively. Land References Nos. 3/77, 5/77 and 6/77 had been consolidated. Land Reference No. 4/77 was heard separately by a separate set of assessors. For the sake of convenience and ease of reference, the judgment for 4/77 is given jointly here with the cases consolidated since except for the category of land used, all the other factors affecting the lands under the consolidation affect also Lot 2184 being in the same locality and subject to the same acquisition. I shall deal first with Land References 3/77, 5/77 and 6/77 in respect of Lots 2183, 351 and 2182 respectively.

The material date of their acquisition was May 4, 1973. The objector has asked for $40,000 per acre for Lot 2182, $45,000 for Lot 2183, $40,000 for Lot 2184 and $60,000 for Lot 351 respectively.

It is common ground in the government and private valuers' reports that the lands acquired are approximately three miles from Kuantan Town. Except for one, they all have frontage to Jalan Tengku Mohamed which is a road linking the main road to Beserah and Jalan Teluk Cempedak. The position of these various places is shown in the plan annexed to both the valuers' reports. They are about less than half a mile to Jalan Teluk Cempedak junction and about three quarter of a mile from the beach. The R.I.M.V. Office, the Assunta Convent, the Istana Mahkota of His Royal Highness, the Menteri Besar's residence and the golf course are roughly within half a mile radius from the lands concerned. The Istana Mahkota is located on Lots 9119 and 6823. The R.I.M.V. Office is on Lot 3394. The Menteri Besar's residence is along Jalan Teluk Cempedak on the fringe of the Government Co-operative Housing Society. With the exception of Lots 2183 and 351, the other lots including Lot 2182 are level, slightly above the road and rising gradually to the rear. Lots 2183 and 351 are about five feet above the road level but rising sharply to the interior to a small hill. At the date of the acquisition, the higher levels of these lands had been cut and cleared. They are, apart from the cutting of land, undeveloped and unmaintained. The lands to the right of Jalan Tengku Mohamed as one faces Jalan Beserah, are undulating and hilly and the lands to the left low and below the road level. The government valuer in his report said the lands along Jalan Tengku Mohamed are, generally considered to possess potential for first class residential development together with other institutional and governmental users. Lots 2381 and 2182 had approved planning permission for housing on March 19, 1966 and September 29, 1964 respectively. But no development had since taken place. In Lots 2183 and 351, layout plans for detached and semi-detached houses were submitted but not approved by the Town Planner. A noticeable fact is that lands to the left of Jalan Tengku Mohamed are relatively more developed than lands to its right as one faces Kuantan. There seems to be some dispute regarding the availability of essential services. According to the government valuer, public transport, water and electricity are not available or adequate whereas the private valuer says they are. He said that these services would in any event follow with development. There were hardly any private developments in this area. According to the